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CHARLES ELMORE CROPLEY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 405

MARVIN GAYES,

Petitioner,

vs.

THE STATE OF NEW YORK

ON WRIT OF CERTIORARI TO THE COUNTY COURT OF MONROE COUNTY, STATE OF NEW YORK

BRIEF FOR THE PETITIONER

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BRIEF FOR THE PETITIONER

Opinion Below

The County Court of Monroe County, State of New York, wrote no opinion. Its order denying petitioner's motion to vacate the judgment of conviction and sentence appears at R. 20-21.

Jurisdiction

The County Court of Monroe County is the highest court of the State of New York in which a decision in the suit

could be had (See *Canizio* v. *New York*, 327 U. S. 82, 85; *People* v. *Gersewitz*, 294 N. Y. 163). Its final determination, embodied in the order denying petitioner's motion, was filed June 14, 1946 (R. 21). The petitioner's motion for leave to proceed in *forma pauperis* in this Court and his petition for a writ of *certiorari* were filed August 16, 1946, and granted December 14, 1946 (R. 22).

The jurisdiction of this Court is invoked under Section 237 (b) of the Judicial Code, as amended by the Act of February 13, 1925 (U. S. C. Title 28, Sec. 344).

Questions Presented

1. Whether a claim of right under the Fourteenth Amendment to the Constitution of the United States was necessarily determined and denied by the order of the County Court.

2. Whether upon the facts alleged and upon those conceded the petitioner was entitled by the Fourteenth Amendment to the Constitution of the United States to have counsel assigned for his assistance before his plea of guilty was accepted by the Court.

3. Whether upon the facts alleged and upon those conceded the petitioner's right to an assignment of counsel was intelligently and competently waived.

Constitutional and Statutory Provisions Involved

The relevant provisions of the Constitution of the United States and of the Constitution and statutes of the State of New York are set forth in the Appendix, *infra*, pp. 30-34.

Statement

On May 16, 1946, petitioner acting *pro se* filed in the County Court of Monroe County, New York, an application and verified petition for "writ of coram nobis", written

in long hand (R. 13-17), embodying a motion to vacate a judgment of that Court rendered on July 28, 1938, convicting him of the crimes of burglary in the third degree and petit larceny and sentencing him to imprisonment in the New York State Vocational Institute at West Coxsackie, New York, for an unspecified term.

The petition and accompanying exhibits showed:

Petitioner and a co-defendant were indicted on July 13, 1938, for the crimes of burglary in the third degree and petit larceny. They were arraigned on July 15, pleaded guilty to the crimes charged and were sentenced on July 28. The petitioner was sentenced to confinement in the New York State Vocational Institute [1] and his co-defendant was placed on probation for five years.

The indictment, on file in the County Court and incorporated in the present record (R. 1-2) charged that the defendants "broke and entered the building and garage of Francis Marolow, doing business under the name and style of Pontiac Garage, with intent to commit therein the crime of larceny" and, in a second count, the theft of the following property "to wit, cigarettes of the value of seventy-five cents ($.75), two flashlights of the value of One Dollar ($1.00) and Three Dollars ($3.00)" in currency.

The record of conviction (Exhibit B, R. 17, 2-3), a printed form with entries made by hand, recited, *inter alia*, that the "defendants having been brought into Court for arraignment on the 15 day of July, 1938, each was asked

[1] Such a sentence, imposed under N. Y. Penal Law Sec. 2184-a for an unspecified term, carried a maximum term of ten years, the maximum for burglary in the third degree as a first offense under the statute defining that crime, N. Y. Penal Law Sec. 407(3). Parole and discharge from the Vocational Institute is governed by rules of the executive authority, formerly the Commissioner of Correction and now the State Board of Parole (See N. Y. Correction Law Sec. 338, as amended by L. 1945, C. 678 § 13).

if he desired the aid of counsel, to which each answered, 'No' and the said defendants were thereupon arraigned upon the indictment, to which each pleads that he is Guilty." It further recited that upon examination by the Court before judgment was pronounced, petitioner stated that he was "born at Savannah, Ga.; resides at S. P. C. C. at Rush, N. Y.; age 16 years; single; parents —— ——; occupation, student; education 2 yr. High; Had religious instruction; habits, temperate; once before convicted."[2]

The petition alleged that the conviction and sentence were rendered "in violation of petitioner's Constitutional Rights"; that he "was not informed of his Constitutional Rights of assistance of Counsel"; that he "was 16 years of age at the time of sentence [and] could not have understood his rights to counsel"; that "he believed, then, when asked 'if he desired counsel,' and answered 'No' that he would be forced to pay the lawyer in the event of conviction or acquittal"; that having "no funds and no relatives that could come immediately to his assistance" he "plead guilty to the indictment." Taking note of the recital in the record of conviction, the petition averred that the record "is silent" as to whether petitioner was informed of the protection accorded his right to counsel under the New York Constitution and Statutes; that the right is "also guaranteed" by "Article 14 of the Amends. to the U. S. Constitution"; that the question "to be attacked or con-

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[2] An unsigned, unattested document entitled "Statement of Defendant," included in the present record (R. 4A) contains the following entries under the heading "Previous Court Record": *Date:* January 14, 1938; *Place* Toronto; *Offense:* Burg. 3rd; *Court*: Toronto, Canada; *Disposition*: 6 months (sic) & deported.

The crime of burglary is not, however, classified according to degrees in Canada (Criminal Code [Rivard, 1939], Part VII, Sec. 455, *et seq.*).

tested" is not the "presumption of regularity" but whether "the petitioner Inteligently (sic) and Competently Waived his rights or Inteligently (sic) and Competently understood his rights to assistance of Counsel" and, finally, that "State and Federal Courts have decided in recent years that youths of the age of 16 years cannot inteligently (sic) and competently waive their rights" (R. 15-16).

The petition also showed that the petitioner has completed serving the sentence to which this challenge is addressed. He is, however, now imprisoned under a sentence of ten to twenty years imposed upon him as a second offender on October 15, 1941, by the County Court of Schenectady upon his plea of guilty to burglary in the third degree.[3] The petition attacks this judgment as "illegal and void" because of the invalidity of the earlier conviction upon which the sentence as a second offender was based. Moreover, as Exhibit "A" (R. 17) to the petition shows, from October 15, 1941, the date of the second conviction, to December 14, 1943, petitioner was imprisoned under the first rather than the second sentence, for not until the latter date did the Division of Parole order that petitioner start serving the new sentence.

After filing his motion to vacate the judgment and sentence of the Monroe County Court, petitioner was advised by a letter from the judge of that Court dated May 16, that his "motion has been placed on the Regular Special Term of this court for June 3rd, 1946 at 10 A. M. at which time you may appear by counsel and in the absence of counsel, your motion will be considered on the moving papers" (R. 7). On May 19, 1946, petitioner sent to the Clerk

[3] The record of conviction of this offense (R. 18-19) does not recite the appearance of counsel or any statement made to the petitioner or by him with respect to counsel.

of the County Court, asking that it "be filed as part of moving papers" (R. 10), a petition to the judge in answer to his letter of May 16 (R. 8-9). This communication stated that the petitioner "who is now being detained at Clinton Prison, has no funds available in order to procure counsel, nor any one reasonably interested, or relatives who may come to his aid" and requested that he be given copies of the papers "to be used in Opposition (sic), so that petitioner may traverse the return and make the proper denial of allegations not conceded by District Attorney" and that he "be given Court assigned counsel to argue the petition" and "a copy of the transcript of such hearing." He also forwarded a letter to the District Attorney purporting to request the service upon him of answering papers at least eight days before the return day of the motion (R. 10). On May 31, he received a reply from the judge of the County Court stating: "I believe my letter of May 16, 1946, fully advises you as to the status of your motion which has been placed on the Regular Special Term calendar for June 3, 1946, at 10 A. M., as you were previously advised" (R. 7).

On June 14, 1946, the County Court entered an order reciting that the motion "having come on to be heard" on June 3 and "having been submitted to the Court at that time", the District Attorney appearing by an Assistant, and "it appearing to this Court that the motion of the petitioner should be denied", it "hereby is denied in all things."

There were no answering papers. The petitioner was neither present nor represented. No evidence was taken. There was no opinion. There were no findings of fact (R. 20-21).

After this Court granted a writ of *certiorari* counsel appointed to represent the petitioner was advised by the District Attorney that the Court stenographer's minutes of

petitioner's arraignment had been found to be available. The minutes are incorporated in the present record (R. 5-6), pursuant to a stipulation of counsel (R. 23) that "they were not before the County Court when the petitioner's application was denied." The stipulation reserves for the judgment of this Court "whether they properly constitute part of the record subject to review in the cause."

The minutes show that the defendant appeared without counsel. An Assistant District Attorney verified the spelling of the defendant's name and summarized the indictment. The further entries are as follows:

> Q. [by the Assistant District Attorney] . . . Do you need a lawyer before you enter a plea of guilty or not guilty to this indictment?
>
> A. No, sir.
>
> Q. What is your plea?
>
> A. Guilty.
>
> Q. You have not received any promises from the district attorney or any member of his staff as to what disposition will be made of your matter?
>
> A. No, sir.
>
> The Court: Adjourned to July 25 for sentence.
>
> July 25, 1938—10 A. M. Same appearances as noted.
>
> The Court: This matter is adjourned to July 28 at ten o'clock.
>
> July 28, 1938—10 A. M. Same appearances as noted.
>
> Mr. Henry: The People move this matter for sentence.
>
> The Clerk: Have you any legal cause to show why the judgment of the Court should not now be imposed upon you?
>
> The Court: Have you anything to say?
>
> Marvin H. Gayes: No, sir.
>
> The Court: It is the sentence of the Court that you be committed to the New York State Vocational School at West Coxsackie, New York, and dealt with there according to law.

Specification of Errors to Be Urged

The County Court of Monroe County, New York, erred:

1. In denying the motion to vacate its judgment of conviction of burglary in the third degree and petty larceny, rendered July 28, 1938, and the sentence based thereon.

2. In holding that on the facts alleged in support of the motion the petitioner was not entitled by the Fourteenth Amendment to have counsel assigned for his assistance before his plea of guilty was accepted by the Court.

3. In holding that on the facts alleged petitioner's right to an assignment of counsel was intelligently and competently waived.

4. In denying petitioner an opportunity to present evidence in support of his motion.

5. In failing to hold that the judgment of conviction and sentence of July 28, 1938, deprived the petitioner of his liberty without due process of law, in violation of the Fourteenth Amendment.

6. In failing to vacate the judgment and sentence of July 28, 1938.

Summary of Argument

I

New York has established a "corrective judicial process" to vindicate the claim that a judgment of conviction under which the State has undertaken to imprison violates the Contion of the United States. The remedy is afforded by motion to vacate the judgment and sentence in the nature of *coram nobis*. It is settled that the remedy is available when the claim of invalidity rests on denial of the right to counsel guaranteed by the Fourteenth Amendment; that the claim may be supported by evidence *dehors* the record; and that the record itself may be corrected if it embodies a mistaken recital of fact. It is also clear that petitioner's

standing is unaffected by the fact that he has served the sentence. For the judgment is an operative element in determining the sentence under which he is now imprisoned as well as the dates of its inception and its end. If the former conviction was invalid, he is now entitled to be resentenced according to law.

There was, therefore, no "local inadequacy" in the petitioner's motion which might support the judgment of the County Court. The order of that Court denying the motion without answer or evidence necessarily held that, on the facts alleged or established by the petition and accompanying exhibits, the Fourteenth Amendment does not confer a right to the assignment of counsel or the right was effectively waived. On either branch of the hypothesis, a Federal right was asserted and erroneously denied.

II

The petitioner's need for counsel is plainly established by the facts. A child of sixteen, indigent and alone, patently unable to retain an attorney, he was charged with a serious offense in an ordinary criminal court. At no point in the proceeding, as the minutes of the arraignment show (R. 5-6), was he accorded protective assistance either by the Prosecutor or by the Court. If he was innocent of any wrongdoing, he obviously could not conduct a trial. If he was guilty of some offense, he could not know whether it was the crime charged or some lesser offense, such as the misdemeanor of unlawful entry. Even if he was guilty as alleged, he could not invoke that conventional exercise of discretion that mitigates the rigor of the criminal law by conviction of a lesser offense than that charged. Even after conviction of the crime charged, he needed representation upon the sentence.

If the petitioner was in need of counsel, the Fourteenth Amendment made the assignment of an attorney his right.

The decisions of this Court establish that, whatever the standard to be applied, a conviction in a State court cannot be maintained under the Constitution if a defendant who needs counsel is deprived of such assistance in the face of a serious charge, because he cannot afford to hire a lawyer and none is assigned by the Court. Nothing either said or held in *Betts* v. *Brady*, 316 U. S. 455 would deny the right to an assignment of counsel in the case of a sixteen year old boy. The decisions make clear that when the need for counsel is patent, an assignment is a constitutional necessity unless the right is effectively waived.

III

If the facts alleged and conceded establish a right to an assignment of counsel, they also show that the right was not intelligently and competently waived. Whatever difference there may be as to the scope of the right to counsel guaranteed by the Fourteenth and the Sixth Amendments, there is no basis for maintaining any difference in the test that determines whether the right was waived. A waiver must be intelligent and competent. The defendant must know of his right, voluntarily choose to forego it and have the capacity to make the choice. Neither knowledge nor competence is established on the facts that are determinative here.

It is true that the record of conviction recites that the defendant answered "No" to the question whether he desired counsel. But the petitioner alleged that he did not understand the question to indicate that counsel could or would be assigned by the Court; and that he answered in the belief that counsel would require a fee that he could not afford to pay. This sufficed to put knowledge in issue. Moreover, the minutes of arraignment, which were not before the court below, show that nothing was actually said about assignment, that petitioner received no instruction as

to his rights or the meaning and consequences of his plea, that no inquiry was undertaken as to his understanding or his capacity either to waive counsel or to plead.

The petitioner is thus entitled, at the least, to prove, if he can, that he did not know and, therefore, could not intelligently waive his right to an assignment of counsel upon his arraignment in the County Court. We submit, beyond this, that the conceded facts establish his incompetence to waive counsel, as a matter of law. For no amount of individual precocity could sustain the view that a boy of sixteen was competent, unaided, to choose to forego counsel; and we know from the minutes of arraignment that he had no assistance from the Court. There is no more room for finding waiver here than in the case of the seventeen year old defendant in *De Meerleer* v. *Michigan* (No. 140, Present Term) where this Court recently set aside a conviction upon the record made when it occurred.

ARGUMENT

The petitioner contends that the order of the County Court denying his motion to vacate the judgment and sentence, entered without an answer to the motion or evidence on the issues posed, necessarily held that, on the facts alleged and upon those conceded, the Fourteenth Amendment does not confer a right to the assignment of counsel or the right was effectively waived. We submit that on either branch of the hypothesis a Federal right was asserted and erroneously denied.

I

A Claim of Right under the Fourteenth Amendment Was Necessarily Denied by the County Court

A. *The Established Procedure in the State Court*

New York has not been derelict in the duty laid upon all the States by *Mooney* v. *Holohan*, 294 U. S. 103 and later

decisions to provide a "corrective judicial process" through which a litigant may vindicate the claim that a judgment of conviction under which the State has undertaken to imprison violates the Constitution of the United States. The remedy, afforded in the Federal courts and in some of the States by writ of *habeas corpus* (e.g. *Johnson* v. *Zerbst*, 304 U. S. 458; *Williams* v. *Kaiser*, 323 U. S. 471), is provided in New York—when appeal is an inadequate remedy—by a motion to vacate the challenged judgment in the nature of *coram nobis* (*Matter of Lyons* v. *Goldstein*, 290 N. Y. 19, 25; *Matter of Morhous* v. *N. Y. Supreme Court*, 293 N. Y. 131, 136; *People* v. *Gersewitz*, 294 N. Y. 163, 167; *Matter of Hogan* v. *Court of General Sessions*, 296 N. Y. 1, 9). That a judgment may be attacked upon such a motion for denial of the right to counsel guaranteed by the due process clause of the Fourteenth Amendment and Article I, Section 6, of the State Constitution has been explicitly held by the Court of Appeals (*Matter of Hogan* v. *Court of General Sessions, supra* p. 9) and twice acknowledged by this Court (*Canizio* v. *New York*, 327 U. S. 82; *Carter* v. *Illinois*, No. 36 Present Term, decided December 9, 1946, slip opinion p. 3; see also *New York ex rel. Whitman* v. *Wilson*, 318 U. S. 688, 690).

There is, moreover, no limitation of the inquiry, as in Illinois, to facts shown on the common law record (*Carter* v. *Illinois, supra*); evidence may be offered *dehors* the record to show that a conviction regular upon its face was in fact the fruit of an unconstitutional invasion of right (*Matter of Hogan* v. *Court of General Sessions, supra* at 9; *Matter of Morhaus* v. *N. Y. Supreme Court, supra* at 140; *cf. De Merleer* v. *Michigan*, No. 140 Present Term, decided February 3, 1947). The duty of the Court if material issues of fact are presented is to conduct a hearing and take the relevant evidence (*Matter of Hogan* v. *Court of General Sessions, supra* at 8-9; *People ex rel. Hirsch-*

berg v. *Orange County Court*, 271 N. Y. 151, 157). Determination without a hearing is possible, as in Federal *habeas corpus* (*Walker* v. *Johnston*, 312 U. S. 275; *Holiday* v. *Johnston*, 313 U. S. 342), only if the motion fails as a matter of law to state a case for relief (*Matter of Hogan* v. *Court of General Sessions*, *supra*).

Moreover, unlike *habeas corpus* which involves a collateral attack, the motion is not precluded from impeaching the verity of the record (*Cf. Riddle* v. *Dyche*, 262 U. S. 333). For the motion is made in the sentencing court which, having control of its records, has the power to correct its mistakes (*People ex rel. Hirschberg* v. *Orange County Court*, *supra*; *People* v. *Craig*, 295 N. Y. 116, 119; *People* v. *Berezac*, 266 App. Div. 813). Correction of the record for clerical error is, indeed, the procedural progenitor of the motion to vacate for denial of fundamental right now recognized by the Court of Appeals (See *Matter of Lyons* v. *Goldstein*, *supra* at 26).

B. *The Petitioner's Standing to Attack the Conviction*

It is immaterial that the petitioner has completed service of his sentence under the conviction he now attacks. For that conviction plays a major part in determining the length of the term of imprisonment under which he is presently held. Had he been sentenced in 1941 as a first rather than a second offender, the maximum sentence permitted by the statute would have been five to ten years (N. Y. Penal Law Secs. 2189, 407) and he might have been sent to Elmira reformatory (N. Y. Penal Law Sec. 2185; N. Y. Correction Law Secs. 288, 289, 296). The sentence of ten to twenty years was mandatory if he was found to be a second offender (N. Y. Penal Law, Sec. 1941). Moreover, the date of inception of the petitioner's present sentence was postponed from June 24, 1941, when his confinement began on the arrest that culminated in the 1941 conviction

(R. 19; see N. Y. Penal Law Sec. 2193), to December 14, 1943, when the Board of Parole directed that service of the second sentence begin (R. 17). During the interval he was held under the earlier sentence (See N. Y. Penal Law Sec. 2190; N. Y. Correction Law Secs. 338, 219; *Canfield* v. *Morhous*, 265 App. Div. 101) and the date of termination of his present sentence was correspondingly postponed.

In light of these facts, it is clear that the cause is not moot; the petitioner suffers "further penalties" on two scores in consequence of the conviction he attacks (see *Fiswick* v. *United States*, No. 51 Present Term, decided December 9, 1946, slip opinion p. 8; *cf. St. Pierre* v. *United States*, 319 U. S. 41). It is equally clear that state law affords a procedure by which these further penalties may be removed. If the 1938 conviction is held void, petitioner may move to vacate his present sentence in the Schenectady County Court and for resentencing according to law (see *People ex rel. Sloan* v. *Lawes*, 255 N. Y. 112; *People ex rel. Carollo* v. *Brophy*, 294 N. Y. 540; *People* v. *Keller*, — Misc. —, 37 N. Y. Supp. (2d) 61). Upon resentence as a first offender, the statute will prescribe no minimum and the Court will presumably take into account the time that petitioner will have served under a void sentence. Before moving for resentence, however, petitioner must overturn the 1938 conviction; the proper forum in which to level that challenge is the Court in which the conviction occurred. Hence, the New York Courts, so far as we know without dissenting voice, have sustained the propriety of a motion to vacate a former conviction which plays an operative part in determining a subsequent sentence under which the petitioner is imprisoned when the motion is made (*People* v. *Bernoff*, — Misc. —, 61 N. Y. Supp. (2d) 46; *People* v. *Foster*, 182 Misc. 73; *People* v. *Paterno*, 187 Misc. 56; *cf. People* v. *Gersewitz*, 294 N. Y. 163, 167; see *People* v. *Keller*, — Misc. —, 37 N. Y. Supp. (2d) 61, 63.

C. *The Ruling of the County Court*

The foregoing considerations wholly preclude the assumption that the County Court "found a local inadequacy" (Frankfurter, J. dissenting in *Williams* v. *Kaiser*, 323 U. S. at 483) in the petitioner's motion and denied it for such cause. Unlike *Williams* v. *Kaiser, supra; Tompkins* v. *Missouri*, 323 U. S. 485 or *Rice* v. *Olsen*, 324 U. S. 786, where the issue divided this Court, there can be no contention in the present case that the judgment, unexplained by findings or opinion, rests upon an adequate state ground.

The verified petition alleged—inartistically but none the less plainly—that the judgment and sentence were void because the petitioner was not assigned counsel or told upon his arraignment that he had the right to have counsel assigned; that he was sixteen years old, indigent, without family or friends who could come to his aid; that even though he was asked if he "desired counsel," as the record of conviction recites (inaccurately as we now know, in that the word was not "desire" but "need" [R. 5]), he did not understand this to mean that he would be assigned a lawyer if he could not pay a fee; that having nowhere to turn for assistance he pleaded guilty to the indictment; and, finally, that in view of his misunderstanding and his age, he cannot be held to have waived his right, guaranteed by the Fourteenth Amendment and the Constitution and statutes of the State.

These were the allegations before the County Court when the petition and the exhibits are read together. Since no evidence was taken, it must be assumed that the allegations of fact were true (*Williams* v. *Kaiser, Tompkins* v. *Missouri, Rice* v. *Olsen, supra*). Rejection of any as false, without according the petitioner an opportunity to offer evidence in their support, would deny due process in

"the primary sense," in violation of the Fourteenth Amendment (see *Brinkerhoff-Faris Trust and Savings Co.* v. *Hill,* 281 U. S. 673, 681; *cf. Saunders* v. *Shaw,* 244 U. S. 317, 319; *Snyder* v. *Massachusetts,* 291 U. S. 97, 116, 128). Thus the Court necessarily determined that on the facts alleged the conviction infringed no fundamental right under State or Federal law. It necessarily held that, though the allegations are assumed to be true, the Fourteenth Amendment does not accord a right to the assignment of counsel or the right was effectively waived. The ruling on the Federal questions is subject to review by this Court. *Canizio* v. *New York, supra; Williams* v. *Kaiser, supra; Herndon* v. *Lowry,* 301 U. S. 242, 247.

II

Upon the Facts Alleged and upon Those Conceded Petitioner Was Entitled by the Fourteenth Amendment to Have Counsel Assigned for His Assistance Before His Plea of Guilty Was Accepted by the Court.

That petitioner was in need of counsel upon his arraignment suffices, we contend, to establish that he was entitled by the Fourteenth Amendment to have counsel assigned for his assistance before his plea of guilty was accepted by the Court.

First: The petitioner's need for counsel is documented by the barest rehearsal of the facts. A child of sixteen, indigent and alone, patently unable to retain an attorney, he was charged with a serious offense in an ordinary criminal court. At no point in the proceeding, as the minutes of the arraignment show (R. 5-6), was he accorded protective assistance either by the Prosecutor or by the Court. Without the aid of counsel he was helpless in the web of the law. If he was innocent of any wrongdoing, he obviously could not conduct a trial. If he was

guilty of some offense, he could not know whether it was the crime charged. If he was guilty as the indictment alleged, he could not invoke that discretion with respect to the grade of conviction and the sentence that is exercised, as a conventional matter, to mitigate the rigor of the criminal law.

Burglary in the third degree is a creature of statute. The crime is defined in New York in technical terms. There must be a breaking as well as an entry with intent to commit a crime or, if a crime is committed in a building, there must be a breaking out (N. Y. Penal Law Sec. 404, 400). Entry or exit, through an open door, without threat or artifice, is not a breaking. Entry alone, without breaking, is a misdemeanor and nothing more (N. Y. Penal Law Sec. 405). Students have trouble with these distinctions. The petitioner could not have known how they applied to his situation, even if he was implicated in the petty theft alleged.

Moreover, professional experience attests that petitioner's need for counsel was not limited to assuring a precise measurement of the facts by the law. One of the dominant characteristics of criminal law administration is the exercise of discretion—by prosecutors and courts in accepting pleas of guilty and by juries in rendering verdicts—to convict of offenses lesser than those charged. Statistical data, though inadequate, serve to illustrate the facts. In New York City in 1938, the year of the petitioner's conviction, defendants pleading to indictments of burglary numbered 1499. Of these, 1289 entered pleas of guilty, 201 or 13.4 per cent to the offense charged, 1088 or 72.5 per cent, to lesser offenses. Of 210 defendants standing trial, 82 were acquitted; 28, or 13 per cent of those convicted, were found guilty of lesser offenses. Indictments for burglary culminated in convictions of the misdemeanor of unlawful entry in 476 cases. *Twelve Months of Crime in New York City,*

A Report by the Citizen's Committee on the Control of Crime (1938) pp. 12, 32.[4] What is involved in this typical representation is not a nullification of the law but individualization in its application, a mitigation inherently necessary in a system that lays down punishments so severe. Thus, even if petitioner had no defense to the charge, he needed counsel to invoke the exercise of this practical discretion. A plea of guilty to unlawful entry would have authorized commitment to the New York State Vocational Institute (N. Y. Penal Law Sec. 2184-a). But it would have saved a sixteen year old boy from the stigma and disability of conviction of a felonious crime.

Finally, apart from the considerations noted, petitioner needed counsel with respect to his sentence which, even on the felony conviction, was discretionary with the Court (N. Y. Penal Law Sec. 2188).

Second: If, as we have urged, the petitioner was in need of counsel, we submit that the Fourteenth Amendment made the assignment of an attorney his right. This is the plain meaning of the "notable chapter in the history of liberty" (Frankfurter, *Law and Politics*, p. 189) begun by this Court in *Powell* v. *Alabama*, 287 U. S. 45 and developed by later decisions, including those at the Present Term.

Powell's case involved, it is true, a capital charge culminating in a sentence of death under circumstances that made the absence of counsel only one among many defects. But the other factors were accorded significance only because they showed how "vital and imperative" (287 U. S. at 71) the necessity of counsel was. The articulate principle of the decision was that a defendant "incapable adequately of making his own defense" must be assigned

[4] A similar result is shown for the following year. See *Crime in New York City in 1939*, Report of the Citizen's Committee on the Control of Crime (1939).

counsel as "a necessary requisite of due process of law", a "logical corollary from the constitutional right to be heard" (287 U. S. at 71, 72). Whatever has been said, therefore, in emphasis of the extreme situation presented (See *Palko* v. *Connecticut*, 302 U. S. 319, 327), the opinion "keeps the word of promise to the ear" (Cardozo, *Law and Literature*, p. 109); the promise has not been broken "to the hope".

It is now clear that the Fourteenth Amendment does not safeguard the right to counsel in capital cases alone (*Rice* v. *Olsen*, 324 U. S. 786; *White* v. *Ragen*, 324 U. S. 760; *Canizio* v. *New York*, 327 U. S. 82; *cf. Williams* v. *Kaiser*, 323 U. S. 471; *Tompkins* v. *Missouri*, 323 U. S. 485), a limitation that would have accorded sentimental priority to the protection of life as opposed to the liberty that gives life meaning and value. The protection is not confined to cases in which the lack of counsel is aggravated by deception or other oppression, though that is constitutionally significant in itself (e.g. *Smith* v. *O'Grady*, 312 U. S. 329; *Ex parte Henry Hawk*, 321 U. S. 114; *cf. Cochran* v. *Kansas*, 316 U. S. 255). It is not restricted to cases in which there is a trial rather than a plea (e.g. *Williams* v. *Kaiser; Tompkins* v. *Missouri; Rice* v. *Olsen; Canizio* v. *New York, supra; House* v. *Mayo*, 324 U. S. 42, 46). Nor is the right to have counsel assigned conditional upon a request (*Tompkins* v. *Missouri; Rice* v. *Olsen, supra;* see *Canizio* v. *New York, supra* at 85). The governing principle that emerges from these decisions is that the Fourteenth Amendment accords a right to the assignment of counsel whenever the assignment is a significant need.

This Court has, to be sure, refrained from formulating a limitation upon the States under the Fourteenth Amendment in terms as absolute as that which the Sixth Amendment imposes on the Federal courts (*Johnson* v. *Zerbst*, 304 U. S. 458; *Walker* v. *Johnston*, 312 U. S. 275; *Glasser*

v. *United States*, 315 U. S. 60; *Adams* v. *U. S. ex rel. McCann*, 317 U. S. 269; *U. S. ex rel McCann* v. *Adams*, 320 U. S. 220), despite strong conviction, uttered in dissent, that the Fourteenth Amendment makes the Sixth no less than the First applicable to the action of the States (See Black, J. dissenting in *Betts* v. *Brady*, 316 U. S. 455, 474-5; *cf. Snyder* v. *Massachusetts*, 291 U. S. 97; *Palko* v. *Connecticut, supra; Malinski* v. *New York*, 324 U. S. 401; *Louisiana* v. *Resweber*, No. 142, Present Term). But belief that the due process clause of the Fourteenth Amendment was not intended as "a compendious expression of the original Bill of Rights" and insistence that some of these safeguards "were built on experience of relative and limited validity" (Frankfurter, J. concurring in *Malinski* v. *New York, supra* at 414) does not impair the view that neither essential "fairness" nor "ample opportunity to meet an accusation" nor the "ultimate dignities of man" (*Carter* v. *Illinois, supra*, Slip Opinion pp. 1, 2) nor "civilized standards of law" (*Malinski* v. *New York, supra* at 414) are satisfied if a defendant who needs counsel is deprived of such assistance in the face of a serious charge, because he cannot afford to hire a lawyer and none is assigned by the Court.

Third: Betts v. *Brady, supra*, will be cited as opposed. While we question its consistency with later decisions and point to difficulties under the opinion as it stands, it does not impair the basic principle that the Fourteenth Amendment confers a right to the assignment of counsel if there is a showing of the need.

The defendant was convicted of robbery in a Maryland court after a trial without a jury in which, unable to afford an attorney, he was compelled to defend himself. His conviction was held compatible with due process. The reasons assigned were, in substance, that the case involved the "simple issue of the veracity of the testimony"

bearing on an alibi defense; "the accused was not helpless, but was a man forty-three years old, of ordinary intelligence and ability to take care of his own interests on the trial of that narrow issue", who had previously pleaded guilty to larceny, served a sentence and "was not wholly unfamiliar with criminal procedure"; and, finally, the trial was by the Court, upon a waiver of jury, with the judge "in a much better position to see impartial justice done than when the formalities of a jury trial are involved" (316 U. S. at 472). These considerations were held to show that the petitioner was not "at a serious disadvantage by reason of the lack of counsel"; and it was added that under the Maryland law, if there had been such a disadvantage, "a refusal to appoint would have resulted in the reversal of a judgment of conviction" (316 U. S. at 473).

We think the most that the decision held is that the Fourteenth Amendment imposes no duty to appoint counsel when there is no genuine need; that no such need was established in the particular case; and, finally, that the Maryland law was not vulnerable as a whole because it did require appointment where "serious disadvantage was shown." The decision is so interpreted *per curiam* in *White* v. *Ragen* (*supra* at 764) by citation, in comparison with later cases, to support the statement that due process requires that "a defendant on trial in a State court upon a serious criminal charge and unable to defend himself shall have the benefit of counsel." We think the later cases properly establish a more generous, more realistic standard for appraising the extent of the inability or the need (see also *Mitchell* v. *Youell*, 130 F. (2d) 880 (C. C. A. 4th)), but nothing either said or held in *Betts* v. *Brady* would deny their existence or their gravity in the case of a sixteen year old boy.

There are, it is true, interpretations of *Betts* v. *Brady* to the effect that the Constitution of the United States

accords a right to the assignment of counsel only if the right to an assignment is conferred by State law (*Mayo* v. *Wade*, 158 F. (2d) 614 (C. C. A. 5th) pending on Petition for *Certiorari*, No. 1022, Present Term; See also *Hoelscher* v. *Howard*, 155 F. (2d) 909, 912 (C. C. A. 7th)). Were that the case, the petitioner would not be disadvantaged for the duty to assign in all criminal cases in which a defendant desires counsel and to advise him of his right is specifically imposed by the law of New York (Code of Criminal Procedure, Secs. 308, 8; see also N. Y. Constitution Art. I, Sec. 6; *People* v. *McLaughlin*, 291 N. Y. 480, 482-483; *People ex rel. Moore* v. *Hunt*, 258 App. Div. 24). We cannot believe, however, that the requirements of the Federal Constitution are modulated to the vagaries of State law. In so far as the right of assignment is a creature of the State, its enforcement is the business of her courts. Errors or departures in this, as in other fields, would present no Federal question (see e.g. *Buchalter* v. *New York*, 319 U. S. 427), unless of course, there was a wilful and invidious discrimination constituting a denial of equal protection (*Cochran* v. *Kansas*, 316 U. S. 255; *Hysler* v. *Florida*, 315 U. S. 411, 422-423; *Snowden* v. *Hughes*, 321 U. S. 1). State law might be relevant, it is true, if it were urged that the State has provided some other protection which adequately substitutes for counsel[5]; but the adequacy of the alleged substitute would presumably be determined on the record before this Court. So, too, if any deference in mat-

[5] Compare the protective function of the Court in juvenile delinquency proceedings which are not treated as prosecutions for crime, though counsel is ordinarily allowed. See e.g. N. Y. Children's Court Act, Laws of 1930, c. 393; Laws of 1944, c. 632 (Proceedings Respecting Youthful Offenders); Cosulich, *Juvenile Court Laws of the United States* [1937]; Grace Abbott, *The Juvenile Court* (1936), The Survey, vol. 2, p. 131; S. and E. T. Glueck, *One Thousand Juvenile Delinquents* (1934); American Law Institute, Youth Court Act (1940); *People* v. *Lewis*, 260 N. Y. 171, *certiorari denied* 289 U. S. 709. *Cf. Prince* v. *Massachusetts*, 321 U. S. 158.

ters of this kind is to be accorded to state judgment (See e.g. Jackson, J., dissenting in *Ashcraft* v. *Tennessee*, 322 U. S. 143, 156; *cf.* Stone, J. concurring in *Skinner* v. *Oklahoma*, 316 U. S. 535, 544; *Thomas* v. *Collins*, 323 U. S. 516, 529-530) it would presumably be accorded to the judgment embodied in the determination of State law under review. It seems clear, therefore, that the existence and scope of a Federal right that the State provide an assignment of counsel cannot depend on whether the State has purported to do so in her law. *Betts* v. *Brady* is perverted if it is thought to stand for propositions at variance with these; it is important that such confusion be dispelled.

Fourth: If we have misread the principle of the decisions, specific authority none the less supports the petitioner in the present case. At the least, *Rice* v. *Olsen*, and *Canizio* v. *New York*, *supra*, proclaim the right to an assignment of counsel under circumstances no more compelling than those that are determinative here—unless the right was effectively waived.

III

Upon the Facts Alleged and upon Those Conceded, the Petitioner's Right to an Assignment of Counsel Was Not Intelligently and Competently Waived.

If the facts alleged establish a right under the Fourteenth Amendment to the assignment of counsel upon petitioner's arraignment, they show no less plainly that the right was not intelligently and competently waived.

First: Whatever difference there may be as to the scope of the right to counsel guaranteed by the Fourteenth and the Sixth Amendments, there is no basis for maintaining any difference in the test that determines whether the right was waived. "A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privi-

lege"; it must be made "intelligently and competently" (*Johnson* v. *Zerbst*, 304 U. S. 458 at 464); it must be voluntary (*Walker* v. *Johnston*, 312 U. S. 275, 286); it is not established by a plea of guilty and cannot be presumed or implied as a matter of law (*Walker* v. *Johnston; Rice* v. *Olsen, supra; cf. Glasser* v. *United States*, 315 U. S. 60). A waiver is possible only if the defendant "knows what he is doing and his choice is made with eyes open" (*Adams* v. *United States ex rel. McCann*, 317 U. S. 269, 279). So this Court has steadfastly held, despite argument to the contrary by the Government (See *Johnson* v. *Zerbst*, *Walker* v. *Johnston*, *supra*); the position has been applied with increasing rigor in the lower Federal courts (See e.g. *Williams* v. *Huff*, 142 F. (2d) 91, 146 F. (2d) 867 (App. D. C.); *Evans* v. *Rives*, 126 F. (2d) 633 (App. D. C.); *Walleck* v. *Hudspeth*, 128 F. (2d) 343 (C. C. A. 10th); *Michener* v. *Johnston*, 141 F. (2d) 171 (C. C. A. 9th); *United States* v. *Steese*, 144 F. (2d) 439 (C. C. A. 3d); *Roberts* v. *United States*, 158 F. (2d) 150 (C. C. A. 4th)) and in the courts of New York (see *Matter of Hogan* v. *Court of General Sessions*, 296 N. Y. 1; *People ex rel. Moore* v. *Hunt*, 258 App. Div. 24, 30; *People* v. *Sedlac*, 53 N. Y. Supp. (2d) 51, 53; *People* v. *Gillette*, 185 Misc. 803, 60 N. Y. Supp. (2d) 64-65; *People* v. *Bernoff*, 61 N. Y. Supp. (2d) 46, 48-49) as well as of other States (See e.g. *State* v. *Murphy*, 248 Wis. 593, 22 N. W. (2d) 685; *State* v. *Jameson*, — S. D. —, 22 N. W. (2d) 731; *In re Stevens*, — Okl. Cr. —, 160 P. (2d) 415).

The question on waiver is thus no less than whether the defendant, with knowledge of his right, competently chose to forego it (*Cf. Adams* v. *United States ex rel. McCann*, *supra; United States ex rel. McCann* v. *Adams*, 320 U. S. 220; *Glasser* v. *United States, supra*). It is an issue on which the defendant's age, experience, intellect and capacity

are highly relevant facts (*Johnson* v. *Zerbst*, 304 U. S. at 464; *Adams* v. *United States ex rel. McCann*, *supra* at 278). Circumstances that would show a waiver by one type of defendant as to another may be entirely without force. For a waiver presupposes knowledge and competence. Neither is established on the facts that are determinative here.

Second: The petitioner's allegations, verified under his oath, put knowledge and competence in issue as plainly as written words can. If they were held inadequate to perform this function, it can only be because the Court below thought the record of conviction dispositive in reciting, by entry on the printed form (R. 2), that each defendant "was asked if he desired the aid of counsel, to which each answered 'No'." But viewed as a part of the pleading, as it must be when no issue is drawn, the recital could not have this effect. Both ignorance and incapacity are asserted and either would negate a waiver though the recital is assumed to be true.

The recital is avoided as to knowledge by allegation that petitioner did not understand the question to inquire whether he wished an assignment of counsel to which no reference was made; that he answered in the belief that the only lawyer in contemplation would require a fee that he could not pay. The recital is avoided as to competence by allegation that a sixteen year old boy "could not have understood his rights". Whatever, therefore, may be the evidentiary value of such a recital in a proceeding in which the record is not conclusive (see p. 13, *supra*), it does not impede the allegations of the motion from stating a meritorious case (*Cf. Williams* v. *Huff*, *supra*).

This Court has heretofore insisted that applications drawn by indigent prisoners *pro se* must be read with a modicum of largesse (*Cochran* v. *Kansas*, *supra* at 257, 258; *Rice* v. *Olsen*, *supra*). The wisdom of the insistence is il-

lustrated by the present case. After judgment in the Court below the stenographer's minutes of petitioner's arraignment have been found to be obtainable (R. 5, 6). Under the law of New York, they are a part of the record in the case (Code of Criminal Procedure Sec. 485; Judiciary Law Sec. 292; *cf. Canizio* v. *New York, supra; People* v. *Duell*, 55 N. Y. Supp. (2d) 247 (Co. Ct.)). They dispel any overtones that might be produced by the formal record of conviction, on the theory that a judge need not "recite with particularity that he performed his duty" (*Carter* v. *Illinois, supra*, Slip Opinion, p. 5; but *cf. People* v. *McLaughlin*, 291 N. Y. 480 at 483). They show that the petitioner was not told that counsel would be appointed to assist him if he desired an attorney's aid; that he was given no instruction as to the statute under which he was indicted, as to his rights as a defendant or the meaning and consequences of his plea; that no inquiry was undertaken as to his understanding or his capacity either to waive counsel or to plead. All that preceded the plea was a prosecutor's summary of the indictment, his question: "Do you need a lawyer before you enter a plea of guilty or not guilty to this indictment", and the further inquiry whether the defendant had received "any promises from the district attorney or any member of his staff as to what disposition will be made." Except for announcing two adjournments and asking the prisoner if he had anything to say, the actual imposition of the sentence was the only word that came from the bench. The circumstances might well be held inadequate to assure that an adult defendant was informed of the right (*Cf. Michener* v. *Johnston, supra; Voigt* v. *Webb*, 47 F. Supp. 743, 747 (D. C. Wash.); *Robinson* v. *Johnston*, 50 F. Supp. 774 (D. C. Calif.); see also *Wood* v. *United States*, 128 F. (2d) 265, 277 (App. D. C.)). Far more explicit admonition has been held insufficient in the case of a youth (*Williams* v. *Huff, supra*).

It understates the position to say that these minutes are of the utmost importance. The court below, in deciding erroneously that no issue of fact was tendered by the motion, deprived itself, in practical effect, of the only real light shed by its own records on what actually happened in the Court. For the minutes would not have been found to be available if the writ of certiorari had not been granted by this Court.

Third: The petitioner is thus entitled, at the least, to give his evidence that he did not know and, therefore, could not intelligently waive his right to an assignment of counsel upon his arraignment in the County Court. This would hardly be doubted if the record were silent on the matter of counsel (*Rice* v. *Olsen; Canizio* v. *New York; People ex rel. Moore* v. *Hunt; People* v. *Sedlac; People* v. *Gillette; People* v. *Bernoff, supra*); for the reasons stated the position is no different in view of the statements that the record shows. At a proper trial of the issue as one of fact he would be aided by his own testimony, by his age and situation at the time of his arraignment and the indication in the minutes of arraignment of the scantiness of the proceedings in Court. These would be weighed in the balance against the evidence, if any is forthcoming, that might be offered on the other side. If all that were involved were the issue of knowledge, reversal would be appropriate with remand for a hearing in these terms (*Rice* v. *Olsen; Tompkins* v. *Missouri, supra*). But more is involved than the question of knowledge. On the minutes of the arraignment now in the record and the petitioner's conceded age at the time, we submit that incompetence to waive counsel affirmatively appears as a matter of law.

Fourth: Even if the petitioner knew of his right to have counsel assigned, an effective waiver was precluded because the petitioner was plainly incompetent to make the choice that the right should be waived. The question of com-

petency, like that of knowledge, may, of course, present only an issue of fact. Under the circumstances shown by the minutes of arraignment we think incompetence appears as a matter of law. Stated differently, we contend that no amount of individual precocity could sustain the view that a boy of sixteen was competent unaided to choose to forego counsel; and we know from the minutes of arraignment that petitioner had no assistance from the Court. Hence, acceptance of his plea of guilty without according him the requisite assistance was a denial of due process of law (*Cf. De Merleer* v. *Michigan*, No. 140, Present Term).

To sustain the contention we need do no more than point to *Adams* v. *United States ex rel. McCann, supra*, where the contention that an adult, litigious by experience and disposition, was incompetent to waive a jury without counsel succeeded in dividing this Court. Only the assurance that the defendant was capable of "weighing his own best interest" (317 U. S. at 280) led a majority to reject the claim advanced. That a boy of sixteen could have the capacity to make the equally difficult evaluation involved in waiving counsel and pleading guilty seems to us impossible to be supposed (*Williams* v. *Huff, supra*, especially opinion of Edgerton, J., 142 F. (2d) 91, 92). Neither the knowledge, nor the experience nor the judgment could on any hypothesis be there (See also *People* v. *Sedlac, supra*, at 53; *People* v. *Bernoff, supra*, at 49). Recognition of this is, of course, one of the major reasons for the creation of the juvenile court and the progressive extension of its principle well above the petitioner's age. If his case arose today in New York he would almost certainly have been treated as a "youthful offender", involving no charge of crime (Laws of 1944, c. 632). We do not say that the Constitution requires advances such as these. We do contend, however, that if the advances are not made, rights conferred by the Fourteenth Amendment cannot be sur-

rendered by a child, charged with a serious crime, unless he has adult guidance in making so momentous a choice. There is no more room for finding waiver here than in the case of the seventeen year old defendant in *De Meerleer* v. *Michigan, supra,* where this Court set aside the conviction upon the record made when it occurred.

Conclusion

For the foregoing reasons we respectfully submit that the judgment of the County Court of Monroe County should be reversed and the cause remanded with direction to vacate the judgment of conviction and the sentence rendered July 28, 1938, or, in the alternative, to determine after a proper hearing on the evidence whether the petitioner's right to an assignment of counsel was intelligently and competently waived.

HERBERT WECHSLER,
Attorney for the Petitioner.

March, 1947.

APPENDIX

Constitution of the United States, Fourteenth Amendment, Section 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Constitution of the State of New York, Article One, Section 6:

> No person shall be held to answer for a capital or otherwise infamous crime . . . unless on indictment of a grand jury, and in any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel as in civil actions and shall be informed of the nature and cause of the accusation and be confronted with the witnesses against him. No persons shall be subject to be twice put in jeopardy for the same offense; nor shall he be compelled in any criminal case to be a witness against himself . . .
>
> No person shall be deprived of life, liberty or property without due process of law.

New York Penal Law:

> Sec. 400. Break—The word "break," as used in this article, means and includes:
>
> 1. Breaking or violently detaching any part, internal or external, of a building; or,
>
> 2. Opening, for the purpose of entering therein, by any means whatever, any outer door of a building, or of any apartment or set of apartments therein sepa-

rately used or occupied, or any window, shutter, scuttle, or other thing used for covering or closing an opening thereto or therein, or which gives passage from one part thereof to another; or,

3. Obtaining an entrance into such a building or apartment, by any threat or artifice used for that purpose, or by collusion with any person therein; or,

4. Entering such a building or apartment by or through any pipe, chimney, or other opening, or by excavating, digging or breaking through or under the building, or the walls or foundation thereof.

Building. The term "building" as used in this article, includes a railway car, vessel, house trailer, booth, tent, shop, inclosed ginseng garden, or other erection or inclosure.

Dwelling-house—A building, any part of which is usually occupied by a person lodging therein at night, is, for the purposes of this article deemed a dwelling-house.

Enter—The word "enter," as used in this article, includes the entrance of the offender into such building or apartment, or the insertion therein of any part of his body or of any instrument or weapon held in his hand, and used, or intended to be used, to threaten or intimidate the inmates, or to detach or remove property.

Sec. 404. A person who:

1. With intent to commit a crime therein, breaks and enters a building or a room, or any part of a building; or,

2. Being in any building, commits a crime therein and breaks out of the same,

Is guilty of burglary in the third degree.

Sec. 405. A person who, under circumstances or in a manner not amounting to a burglary, enters a building, or any part thereof, with intent to commit a crime, is guilty of a misdemeanor.

Sec. 407. Burglary is punishable by imprisonment in a state prison as follows:

1. Burglary in the first degree, for an indeterminate term the minimum of which shall be not less than ten years and the maximum of which shall be not more than thirty years.

2. Burglary in the second degree, for a term not exceeding fifteen years.

3. Burglary in the third degree, for a term not exceeding ten years.

Sec. 1941. A person, who, after having been once or twice convicted within this state, of a felony, of an attempt to commit a felony, or, under the laws of any other state, government, or country, of a crime which, if committed within this state, would be a felony, commits any felony, within this state, is punishable upon conviction of such second or third offense, as follows:

If the second or third felony is such that, upon a first conviction, the offender would be punishable by imprisonment for any term less than his natural life, then such person must be sentenced to imprisonment for an indeterminate term, the minimum of which shall be not less than one-half of the longest term prescribed upon a first conviction, and the maximum of which shall be not longer than twice such longest term; provided, however, that the minimum sentence imposed hereunder upon such second or third felony offender shall in no case be less than five years; except that where the maximum punishment for a second or third felony offender hereunder is five years or less, the minimum sentence must be not less than two years.

Sec. 2184-a. Where a male person, sixteen years of age or over, but less than nineteen years of age, has been adjudicated to be a juvenile delinquent, or found to be a disorderly person, or a wayward minor, or a vagrant, or found guilty of any offense or of a misdemeanor, or of a felony, except crimes punishable by death or life imprisonment, the trial court may, instead

of sentencing him to imprisonment in a state prison or in a penitentiary, direct him to be confined in the New York house of refuge established by the society for the reformation of juvenile delinquents in the city of New York, or its successor body in law, the New York state vocational institution, under the provisions of the statutes relating thereto. The term of any person so convicted and sentenced for a felony shall not exceed the maximum term, provided by law for the crime for which the person so convicted and sentenced and in the case of any person convicted and sentenced for any other offense or for a misdemeanor, the term of imprisonment shall be for a period not exceeding three years.

Sec. 2185. A male between the ages of sixteen and thirty, convicted of a felony, who has not theretofore been convicted of a crime punishable by imprisonment in a state prison, may, in the discretion of the trial court be sentenced to imprisonment in the New York state reformatory at Elmira, to be there confined under the provisions of law relating to that reformatory.

Sec. 2189. A person never before convicted of a crime punishable by imprisonment in a state prison, or who, though previously convicted of such a crime, is not punishable under the provisions of section nineteen hundred forty-one or nineteen hundred forty-two, who is convicted in any court in this state of a felony other than murder first or second degree or kidnaping, and sentenced to a state prison, shall be sentenced thereto under an indeterminate sentence, the minimum of which shall not be less than one year, or in case a minimum is fixed by law, not less than such minimum; otherwise, the minimum of such sentence shall not be more than one-half the longest period and the maximum shall not be more than the longest period fixed by law for which the crime is punishable of which the offender is convicted.

Sec. 2190. 1. Where a person is convicted of two or more offenses before sentence has been pronounced upon him for either offense, the imprisonment to

which he is sentenced upon the second or other subsequent conviction, must commence at the termination of the first or other prior term or terms of imprisonment, to which he is sentenced.

New York Code of Criminal Procedure

Sec. 8. *Rights of defendant in a criminal action.*

In a criminal action the defendant is entitled

1. To a speedy and public trial;

2. To be allowed counsel as in civil actions, or he may appear and defend in person and with counsel;

Sec. 308. *Defendant appearing for arraignment without counsel to be informed of his right to counsel.*

If the defendant appear for arraignment without counsel, he must be asked if he desire the aid of counsel, and if he does the court must assign counsel,

Sec. 485. *The judgment-roll.*

When judgment upon a conviction is rendered, the clerk must enter the same upon the minutes, stating briefly the offense for which the conviction has been had; and must, upon the service upon him of notice of appeal, immediately annex together and file the following papers, which constitute the judgment-roll:

* * * * * * *

2. The indictment and a copy of the minutes of the plea or demurrer; . . .

New York Judiciary Law

Sec. 292. The original stenographic notes, taken by a stenographer, are part of the proceedings in the cause.